No. 75-777

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FOR ARGUMENT

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I

The "essence" of respondent's "case is that a strike by employees against their own employer in defense of their own working conditions is protected primary activity, not a prohibited secondary boycott" (Br. 9). Almost all of the Union's presentation is devoted to showing the legitimacy of strikes about working conditions; we have no quarrel with much of this presentation. But the step from this premise to the Union's conclusion that its activity here was lawful requires the assistance of a

further assumption: that if economic pressure has a (legitimate) primary object, it cannot have a (forbidden) secondary object as well. Unless the Court agrees with the Union that pressure with a primary object cannot also have a secondary object, the Union's argument cannot prevail. We submit that the assumption is unfounded and that, as a result, the Union's argument—that all disputes between employees and their employer are permitted by the Act—is incorrect.

A few examples suffice to show the error of the Union's position. (1) A controversy over whether the employees of a unionized employer shall be required to work on the same job site with the employees of a nonunion employer, or whether union employees shall be required to handle goods produced by nonunion employees, involves a dispute over the "working conditions" of the union employees and implicates the employee-employer relationship. Yet is is clear that a strike against their employer in order to eliminate the conditions mentioned would have a secondary object and thus violate Section 8(b)(4)(B) of the Act. See *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675; *Local 1976, Carpenters* v. *National Labor Relations Board (Sand Door)*, 357 U.S. 93. (2) Union efforts to acquire for employees covered by a work preservation agreement a different type of work than they previously had performed may provoke a dispute with their employer concerning their "working conditions," but pressure to obtain such work has a secondary object and hence is unlawful. See cases cited at pages 24-25 of our opening brief.

The fact is that some economic pressure directed against the immediate employer of the employees may be an attempt to conscript the employer into the Union's campaign against third parties. When that happens, the economic pressure has a secondary object. A proper accom-

modation of the competing interests involved,[1] and due regard for the fact that Section 8(b)(4)(B) proscribes activity if "an" object is secondary (*Denver*, *supra*, 341 U.S. at 689), requires the recognition of this possibility. As a result, the activity in this case cannot be approved simply because the Union may have been concerned about the working conditions of Hudik's employees.

When a union brings pressure on an employer to obtain work the employer has no right to control, it gives every necessary indication of having an object beyond influencing that employer's decision. It cannot succeed unless it can conscript the aid of the employer to bring pressure on third parties in order to change their decisions. In this case the Union could have obtained the work it sought only if it (with Hudik's aid) could have induced Austin to alter Austin's specifications and its business relations with Slant/Fin.[2]

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[1]In *Denver*, *supra*, 341 U.S. at 692, the Court indicated that Section 8(b)(4)(A) of the Act (now Section 8(b)(4)(B)) should be interpreted so as to foster "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."

[2]The opinion of the court of appeals appears to recognize this (Pet. App. 22a, n. 25):

> [T]he ALJ in this case asked rhetorically: "[I]f Hudik, an employer of union steamfitters, does not bid on jobs and does not secure subcontracts, how does such a situation preserve or increase work for Hudik's union steamfitters[?]" * * * Yet he unknowingly answered that question himself earlier in this opinion: "If prepaid [sic] units cannot be installed * * * Austin and other engineers and general contractors will not specify their purchase and use in buildings."

In contrast to *National Woodwork*,[3] where the union could have accomplished its design by changing the decision of Frouge alone, here the Union's efforts could not have succeeded without changing Austin's decision as well as Hudik's.[4] It was reasonable, therefore, for the Board to conclude that forcing a cessation of, or change in, business relations, although "incidental" in *National Woodwork*, was "an" object of the Union here.

II

The Board's conclusion that the Union engaged in unlawful secondary activity is not inconsistent with the Board's assumption that the refusal of the Union "to let Hudik's employees install the climate control units was based on a valid work preservation clause in the agreement with Hudik, * * * and was for the purpose of preserving work they had traditionally performed" (Pet. App. 141a). That a work preservation clause is "valid" means no more than that it can be legitimately enforced in one or more applications (as was true in *National Woodwork*); its validity does not imply that its enforcement with a secondary object, by means proscribed by Section 8(b)(4), also is legitimate.[5]

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[3] *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612.

[4] In concluding that the activity in *National Woodwork* was primary, the Court relied, *inter alia*, on the fact that, under *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, Frouge would have been obligated to bargain with the union over the contracting out of the work in question. *National Woodwork*, *supra*, 386 U.S. at 642-643. As the Board pointed out in *George Koch Sons, Inc.*, 201 NLRB 59, 63 n. 22, an employer could not be compelled to bargain over the contracting out of work that it never controlled.

[5] No charge was filed with the Board challenging the clause under Section 8(e) of the Act, 29 U.S.C. 158(e), which makes it unlawful "to enter into" a secondary boycott agreement. A proviso to Section 8(e), however, allows such agreements in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." But an agreement protected by the proviso cannot be enforced by means which would constitute restraint and coercion within the meaning of Section 8(b)(4) (see our opening Br. 30 n. 21).

The Union's argument that it is always legitimate primary activity for employees to seek to "enforce" a "valid" contractual agreement with their employer devolves into the argument that no dispute with an immediate employer can have a secondary object. We have already explained why this argument is incorrect. If, as we have argued, the Union cannot use an employer as its cat's paw in a dispute with someone else, it stands in no better shoes if it induces an employer to sign an agreement promising to help the Union attain its secondary object and then uses economic pressure to enforce that promise. The Union's object to affect the decisions of third parties remains the same; the device it uses (economic pressure against an immediate employer) is the same; and the employer's responsive promise to do what it can to help the Union therefore avails the Union nothing.

The Board's position that a valid agreement may not be used to provide a shield for otherwise unlawful secondary activity is not "incompatible with the system of collective bargaining established by the Act" (Union Br. 26).[6]

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[6] The Union seems to suggest (Br. 27) for example, that the Board would find a secondary object in an employer's decision not to bid on a contract that would not produce revenues sufficient to pay its employees' wages. This hyperbolic example, and the others following it, are illuminating: in all of them the employer had a right to control the work in question. Because the right to control the plumbing in the Slant/Fin units is lacking here, the situation is different. The Union has not produced any example in which the employer lacks the right to control, yet the Union's activity is "obviously" primary.

The parties cannot by contract convert into primary activity that which the statute makes secondary. See *Local 1976, Carpenters (Sand Door), supra,* 357 U.S. at 105.[7] The irrelevancy of the agreement to the question whether the Union's conduct violated Section 8(b)(4)(B) of the Act is further demonstrated by the decision of the court below in *Local 742, Carpenters* v. *National Labor Relations Board,* 533 F. 2d 683 (C.A. D.C.), petitions for writs of certiorari pending, Nos. 75-1706, 75-1755, in which the court disapproved the Board's finding of a Section 8(b)(4)(B) violation, in a situation comparable to that here, even in the absence of a work preservation agreement (see our opening Br. 28, n. 19).

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to enforce the Board's order.

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[7]Although the agreement in *Sand Door* was a secondary boycott agreement which would now be unlawful under Section 8(e) (see n. 5, *supra*), such agreements were not unlawful at the time that case was decided. This Court nonetheless held that a strike to enforce a lawful secondary boycott agreement came within the terms of, and thus was barred by, Section 8(b)(4)(A) (now Section 8(b)(4)(B)) of the Act.

Respectfully submitted.

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